90-1136

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1989

RICHARD FRAIGE and VINYL PRODUCTS MANUFACTURING, INC.,

Petitioners,

vs.

AMERICAN NATIONAL WATERMATTRESS CORPORATION,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

HARRIS ZIMMERMAN
Counsel of Record
MICHAEL J. CRONEN
1330 Broadway, Suite 1150
Oakland, California 94612
(415) 465-0828
Attorneys for Petitioners

10871
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QUESTIONS PRESENTED

1. Where a notice of appeal has previously been filed, whether the filing of documents in the district and/or appellate court otherwise required for the perfecting of an appeal constitute the functional equivalent of a valid notice of appeal where appellee is neither prejudiced nor misled; and

2. Whether dismissal of an appeal is appropriate when in light of the totality of the circumstances it is clear that the district and appellate courts and all parties to the appeal were fully aware of the appellants' intent and efforts to appeal during the appropriate thirty-day appeal period.

LIST OF PARTIES

The names of all parties to the proceeding in the court whose judgment is sought to be reviewed appear in the caption of the case.

RULE 29.1 LIST

Vinyl Products Manufacturing, Inc. has no parent company or subsidiaries.

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No.

In The

Supreme Court of the United States

October Term, 1989

RICHARD FRAIGE and VINYL PRODUCTS MANUFACTURING, INC.,

Petitioners,

vs.

AMERICAN NATIONAL WATERMATTRESS CORPORATION,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

The petitioners Richard Fraige and Vinyl Products Manufacturing, Inc. respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Federal Circuit, entered in the above-entitled proceeding on March 22, 1990.

OPINIONS BELOW

The opinion and order of the Court of Appeals for the Federal Circuit (Archer, C.J.) has not been reported. It is reprinted in the Appendix hereto, p. 1a, *infra*.

The judgment of the United States District Court for the Central District of California (Hupp, D.J.) has not been reported. It is reprinted in the Appendix hereto, p. 5a, *infra*.

STATEMENT OF JURISDICTION

Invoking federal jurisdiction under 28 U.S.C. § 1338(a) and (b), the petitioners brought this suit in the United States District Court for the Central District of California. On July 20, 1989, the Central District entered judgment in favor of respondent holding petitioners' patent, U.S. Patent No. 4,301,560 invalid (5a).

On petitioners' appeal, the Court of Appeals for the Federal Circuit on March 22, 1990 entered an order and an opinion dismissing petitioners' appeal (1a). No petition for rehearing was sought. However, petitioners filed a motion for reconsideration of order granting appellee's motion to dismiss appeal and suggestion that order be reconsidered in banc within the Court of Appeals for the Federal Circuit on April 3, 1990.

The jurisdiction of this Court to review the judgment of the Federal Circuit is invoked under 28 U.S.C. § 1541(1).

FEDERAL RULE INVOLVED

Federal Rules of Appellate Procedure, Rule 3(c), 28 U.S.C. *Content of the Notice of Appeal:*

The notice of appeal should specify the party

> or parties taking the appeal; shall designate the judgment, order or part thereof appealed from; and shall name the court to which the appeal is taken. Form 1 in the Appendix of Forms is a suggested form of a notice of appeal. An appeal shall not be dismissed for informality of form or title of the notice of appeal.

STATEMENT OF THE CASE

This is an action for patent infringement brought by petitioners in the United States District Court for the Central District of California pursuant to 28 U.S.C. § 1338. Following a jury trial, a verdict of patent invalidity was rendered in favor of respondent holding petitioners' United States Patent No. 4,301,560 ('560 patent) invalid. The jury also found that respondent had infringed the '560 patent and that respondent's implied license defense was without merit. The jury verdict was rendered on June 26, 1989.

On July 7, 1989 petitioners advised respondent in writing of petitioners' intent to appeal the jury's finding of patent invalidity. On July 12, 1989, respondent wrote back to petitioners acknowledging petitioners' intent to appeal the invalidity determination (10a).

On July 19, 1989 the District Court filed judgment in the case which the clerk entered in the Civil Docket Sheet on July 20, 1989 (5a).

On August 2, 1989 respondent filed a motion for judgment notwithstanding the verdict or, alternatively, to amend the judgment under F. R. Civ. P. 50(b)/59(e) on certain issues unrelated to the judgment of patent invalidity.

On August 15, 1989, after determining that respondent's post-judgment motions would in no manner affect the underlying judgment of invalidity, and while respondent's post-trial motion remained pending, petitioners filed in the District Court a notice of appeal from judgment entered on July 20, 1989 (12a). The notice of appeal stated that the appeal was taken to the United States District Court of Appeals for the Federal Circuit by petitioners from the judgment of patent invalidity entered on July 19, 1989. Sixteen days later, on September 1, 1989, the District Court denied respondent's post-judgment motions.

On September 5, 1989, petitioners wrote to the District Court clerk concerning payment for the filing of its notice of appeal. This letter was stamped "RECEIVED" by the District Court clerk on September 7, 1989 and returned to petitioners with the notation "9/7/89 Fees Paid" (15a). This letter also incorporated by reference the notice of appeal previously filed by petitioners.

On September 14, 1989 petitioners' appeal was docketed in the Court of Appeals for the Federal Circuit and a formal notice of docketing of the appeal was sent to the District Court and to respondent as required by Rule 12 of the Federal Rules of Appellate Procedure (19a). The notice of docketing specifically named petitioners as appealing from the judgment, Docket No. 87-4046, in the United States District Court for the Central District of California and that the appeal was taken to the United States Court of Appeals for the Federal Circuit. Also on this date, petitioners received from the Federal Circuit written information regarding the prosecution of the then-pending appeal.

On September 19, 1989 petitioners contacted both the Federal Circuit and District Court clerks by telephone regarding the preparation and filing of various documents necessary to perfect the appeal. On this day, petitioners also phoned the official court reporter for the District Court regarding the preparation and filing

of the trial transcript for purposes of the appeal.

On September 20, 1989 petitioners again reaffirmed their intention to appeal by filing their "Transcript Purchase Order" form in the District Court as required by Rule 10 of the Federal Rules of Appellate Procedure (22a). Petitioners sent copies of this document to respondent. The transcript purchase order form filed with the District Court named petitioner Fraige as appealing from the Trial Court Docket No. 87-4046, the United States District Court for the Central District to the United States Court of Appeals for the Federal Circuit, Circuit Court No. 89-1720. Petitioners also telephoned the official court reporter for the District Court two times on September 20 regarding the timely preparation of the trial transcript for use on appeal.

On September 21, petitioners telephoned the Federal Circuit clerk regarding proper preparation and filing of petitioners' certificate of interest, entry of appearance, transcript purchase order form and application for admission to practice before the Federal Circuit for the purposes of the appeal.

On September 22, 1989 petitioners filed their formal entry of appearance and certificate of interest in the Federal Circuit and served copies of these documents on respondent as required by Federal Circuit Rules 47.3 and 47.4 (24a). Also on September 22, 1989 petitioners received from the District Court official court reporter correspondence regarding the preparation of the trial transcript and acknowledging petitioners' intent to appeal (28a).

On September 27, 1989 respondent filed its formal entry of appearance and certificate of interest with the Federal Circuit as required by Federal Circuit Rules 47.3 and 47.4 (29a). Respondent sent copies of both these documents to petitioners on this date.

Thereafter, on October 26, 1989 petitioners filed a motion

in the Court of Appeals requesting an enlargement of time for filing the brief of appellant. Petitioners had advised respondent that it would request an enlargement of time and after discussing the matter, respondent indicated that it would not object to the request. Petitioners' motion for an extension of time to file their brief was granted on November 2, 1989.

On November 22, 1989 respondent filed a motion to dismiss appeal asserting that petitioners had not filed a legally cognizable notice of appeal.

On March 22, 1990 the Federal Circuit dismissed petitioners' appeal noting that petitioners' notice of appeal filed on August 15, 1989 was a nullity because it was filed sixteen days before respondent's post-judgment motions had been denied (1a). The Federal Circuit further specifically found that neither the filing of petitioners' "Transcript Purchase Order" form nor its correspondence to the District Court clerk regarding the payment of the notice of appeal filing fee constituted the "functional equivalent" of a notice of appeal. *Ibid.*

REASONS FOR GRANTING THE WRIT

I.

The Federal Circuit's ruling that documents filed incident to an appeal may not function as a notice of appeal conflicts with decisions of other Circuits.

The Federal Circuit dismissed petitioners' appeal specifically finding that petitioners' "Transcript Purchase Order" form filed in the District Court as required under F. R. App. P. 10(b) did not constitute the functional equivalent of a notice of appeal. The Federal Circuit also failed to recognize documents filed as required by Appellate Rule 12 (notice of docketing) or Federal

Circuit Rules 47.3 (notice of appearance) and 47.4 (certificate of interest) as notice of appeal equivalents. This draconian application of appellate jurisdiction notice requirements deserves this Court's attention because it raises issues going to the heart of federal jurisdiction and the right to appeal.

The Federal Circuit's ruling that petitioners' Rule 10(b) transcript purchase order form is not the functional equivalent of a notice of appeal is in direct conflict with the District of Columbia Circuit's ruling in *Nichols v. Asbestos Workers Local 24 Pension Plan*, 835 F.2d 881, 888 (D.C. Cir. 1987). In *Nichols* the court found that appellants' notice of appeal filed before disposition of appellees' motion to reconsider was premature and thus "ineffective." However, *Nichols* nevertheless held that the deficiency was cured when appellants filed a document required by F. R. App. P. 10(b) in the appellate court and served it on appellees. The court in *Nichols* added, in words particularly relevant to the Federal Circuit's denial of jurisdiction here, that appellants' Rule 10(b) document "plainly reveals their intention to appeal from a particular judgment, and appellees do not assert prejudice from the designation utilized." *Nichols*, 835 F.2d at p. 89. *Nichols* further ruled that because appellants' Rule 10(b) document possessed "the prerequisites called for by Rule 3(c)," it "cured the defect of the earlier notice, and preserved [the] appeal." *Ibid.*

The conflict between *Nichols* and the present case is complete. While *Nichols* involved a Rule 10(b) certificate that appellants would *not* order a court transcript for use on appeal, in contrast, petitioners here filed a Rule 10(b) document in the District Court *ordering* a trial transcript for use on appeal. Thus, the present case presents a stronger basis for finding a valid notice of appeal in petitioners' Rule 10(b) document.

This case also deserves this Court's attention because it raises

the jurisdictional issue of whether the filing of documents in the District Court and/or the Court of Appeals which are otherwise required for, or incident to, the perfecting of an appeal constitute the functional equivalent of a notice of appeal where the parties to the appeal are neither prejudiced nor misled thereby. This issue, as set forth above in the context of the mandates of appellate Rule 10(b), has created a great deal of conflict in decisions of various Circuit Court of Appeals. This is particularly well-illustrated by the different results reached by the various Circuits in connection with the issue of whether appeal briefs may serve as notices of appeal.

For example, the Third Circuit in *Frace v. Russell,* 341 F.2d 901, 903 (3rd Cir. 1965) and the Ninth Circuit in *Allah v. Superior Court of the State of California,* 871 F.2d 887, 889 (9th Cir. 1989) have held that an appellant's opening brief may serve as a proper notice of appeal if filed within the appropriate appeal period. By contrast, and in direct conflict with these cases, the Fifth Circuit in *United States v. Cooper,* 876 F.2d 1192, 1195 (5th Cir. 1989) and the Eleventh Circuit in *Florida Women's Medical Clinic, Inc. v. Smith,* 706 F.2d 1172, 1173 (11th Cir. 1983) have held that an appellant's brief may *not* serve as a notice of appeal. The conflict illustrated by these cases is on point here because, like petitioners' transcript purchase order form, appellants are required by appellate rule to file opening briefs. (*See* F. R. App. P. 31.)

Moreover, here, the issue of whether documents filed incident to an appeal may serve as notices of appeal is raised in connection with the Federal Circuit's refusal to recognize its own notice of docketing (F. R. App. P. 12), and/or the parties' entry of appearance and certificate of interest documents (Fed. Cir. R. 47.3 and 47.4), as the functional equivalent of a valid notice of appeal.

The Federal Circuit's ruling in this case has created a precedent

in conflict with other Circuit Courts of Appeals' decisions. By dismissing petitioners' appeal it has allowed form to dictate over substance. Plenary consideration of the matter by this Court is essential. The law governing appeals and appellate jurisdiction must not be reduced to mere procedural formality masquerading as substantive dispute resolution.

II.

The Federal Circuit's dismissal of petitioners' appeal in light of the totality of the circumstances of this case conflicts with the decisions of this Court and other Circuits thereby raising important and unresolved problems.

The Federal Circuit has here held that the filing of several documents in the District Court and Court of Appeals evincing petitioners' intent to appeal, combined with petitioners' extensive contacts with both these courts concerning perfecting the appeal, is not sufficient to meet the requirements of Rule 3(c) even where respondent knew of petitioners' intent to appeal and was neither misled nor prejudiced.

Thus is raised a significant question whether dismissal of an appeal is appropriate when it is clear that all parties thereto and both the trial and appellate courts are fully aware of appellant's intent and efforts to appeal during the thirty day period subsequent to disposition of appellee's post-judgment motions.

Query, then, whether the liberal construction of Rule 3(c) mandated by this Court and urged by the Advisory Committee on Appellate Rules has been ignored by the Federal Circuit in dismissing petitioners' appeal. In light of the dismissal here, it appears that the Federal Circuit has created a new harsh and formalistic rule that a notice of appeal must not only contain the information required by Rule 3(c) but it must also be labelled as a "Notice of Appeal".

However, this is contrary to the language of Rule 3(c) itself which states "[a]n appeal shall not be dismissed for informality of form or title of the notice of appeal."

The Federal Circuit's ruling here is also contrary to this Court's rulings in *Foman v. Davis*, 341 U.S. 178, 83 S. Ct. 227 (1962) and *Torres v. Oakland Scavenger Co.*, 108 S. Ct. 2405 (1988).

In *Foman*, this Court held that in light of all the circumstances, it was appropriate to view an earlier premature notice of appeal *together* with latter "inept" attempts to appeal and all other papers showing petitioner's intent to appeal in order to find a valid notice of appeal. This Court further noted in *Foman* that "[i]t is too late in the day and entirely contrary to the spirit of the Federal Rules of Civil Procedure for decisions on the merits to be avoided on the basis of mere technicalities." *Foman*, 341 U.S. at p. 180.

More recently, in *Torres*, this Court reaffirmed the rule in *Foman* stating "that the requirements of the rules of procedure should be liberally construed and that 'mere technicalities' should not stand in the way of consideration of a case on its merits." *Torres*, 108 S. Ct. at p. 2408. This is in direct conflict with the Federal Circuit's ruling in this case as set forth hereinabove.

The Federal Circuit's ruling in this case also conflicts with other Circuits' decisions interpreting Rule 3(c). *See Tidemark, Inc. v. Brazos Port Towing Co., Inc.*, 756 F.2d 1236, 1237 (5th Cir. 1986) (any document accomplishing dual objectives of notifying court and opposing counsel of appeal sufficient to satisfy Rule 3(c)); *Nichols v. Asbestos Workers Local*, 835 F.2d 881, 888 (D.C. Cir. 1987) (certificate filed in Court of Appeals notifying court that appellant would not order trial transcript sufficient to satisfy the rule); *Cobb v. Lewis*, 488 F.2d 41 (5th Cir. 1974)

(notice requirement satisfied by any statement either to the District Court or Court of Appeals clearly evincing an intent to appeal); *United States v. One Mercedes Benz*, 708 F.2d 444 (9th Cir. 1983) (failure to designate judgment no bar to appeal where intent to appeal specific judgment fairly inferred and appellee not prejudiced or misled).

The Federal Circuit's dismissal of petitioners' appeal is also contrary to the Notes of the Advisory Committee on Rule 3(c) which state "so long as the function of notice is met by the filing of a paper indicating an intention to appeal, the substance of the rule has been met." Notes of Advisory Committee on Appellate Rules, 1979 Amendment to subdivision (c) of Rule 3.

Lower courts need guidance from this Court as to the applicability of Rule 3(c) in situations where, like the present case, petitioners' intent to appeal was clearly communicated to the district and appellate courts and to respondent through filed documents and other communication evincing petitioners' intent to appeal during the thirty days following disposition of respondent's post-judgment motions. This is particularly important where, as here, respondent was neither misled nor prejudiced concerning petitioners' intent to appeal. It is too late in the day to allow a formalistic application of procedural rules to preclude a decision on the merits in this case and similar cases throughout the federal court system.

CONCLUSION

For these reasons, this petition for writ of certiorari should be granted.

Respectfully submitted,

HARRIS ZIMMERMAN
MICHAEL J. CRONEN
Attorneys for Petitioners

APPENDIX A — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT FILED MARCH 22, 1990

Note: This Order has not been prepared for publication in a printed volume because it does not add significantly to the body of law and is not of widespread legal interest. It is a public record. It is not citable as precedent.

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

89-1720

RICHARD FRAIGE and VINYL PRODUCTS MANUFACTURING, INC.,

Plaintiffs-Apellants,

v.

AMERICAN NATIONAL WATERMATTRESS CORP.,

Defendant-Appellee.

ON MOTION

Before ARCHER, *Circuit Judge*, BALDWIN, and BENNETT, *Senior Circuit Judges*.

ARCHER, *Circuit Judge*.

ORDER

American National Watermattress Corp. (AM-NAT) moves

to dismiss the appeal of Richard Fraige and Vinyl Products Manufacturing, Inc. (Vinyl). Vinyl opposes the motion.

Following a jury trial, the United States District Court for the Central District of California filed a judgment on July 19, 1989. The docket sheet shows that it was entered by the Clerk on July 20, 1989. The judgment in accordance with the jury verdict stated, inter alia, that AM-NAT infringed certain claims of Vinyl's patent, that AM-NAT had not pevailed on its implied license defense, and that pertinent claims of Vinyl's patent were invalid. AM-NAT subsequently filed a timely motion for "Judgment Notwithstanding the Verdict on Specified Issues, or, Alternatively, Amendment to the Judgment" pursuant to Fed. R. Civ. P. 50(b)/59(e). In the motion, AM-NAT moved the court to set aside or alter the jury's finding of infringement and for judgment NOV establishing its implied license defense. Prior to the district court ruling on AM-NAT's motion, Vinyl filed a notice of appeal.

On September 1, 1989, the district court denied AM-NAT's post-judgment motion. Vinyl did not file another notice of appeal. Fed. R. App. P. 4(a)(4) provides:

> If a timely motion under the Federal Rules of Civil Procedure is filed in the district court by any party: (i) for judgment under Rule 59(b); (ii) under Rule 52(b) to amend or make additional findings of fact, whether or not an alteration of the judgment would be required if the motion is granted; (iii) under Rule 59 to alter or amend the judgment; or (iv) under Rule 59 for a new trial, the time for appeal for all parties shall run from the entry of the order denying a new trial or granting or denying any other such motion. A

> notice of appeal filed before the disposition of any of the above motions shall have no effect. A new notice of appeal must be filed within the prescribed time measured from the entry of the order disposing of the motion as provided above. No additional fees shall be required for such filing.

Rule 4(a)(4) is jurisdictional and may not be waived by a court of appeals. 9 Moore's Federal Practice ¶ 204.12[1]. In *Griggs v. Provident Consumer Discount Co.*, 459 U.S. 56 (1982) the Supreme Court stated that an appeal filed before a timely Rule 50(b), 52(b), or 59(e) motion is ruled on was

> not merely defective; it was a nullity. Under the plain language of the current Rule, a premature notice of appeal "shall have no effect;" a new notice "must be filed." In short, it is as if no notice of appeal were filed at all. And if no notice of appeal is filed at all, the Court of Appeals lacks jurisdiction to act. It is well settled that a timely notice of appeal is "mandatory and jurisdictional."

Griggs, 459 U.S. at 61. *Accord Tylo Sauna, S.A. v. Amerec Corp.*, 826 F.2d 7 (Fed. Cir. 1987).

Vinyl's arguments that the rules do not apply in its case are without merit. We specifically find that neither Vinyl's letter to the district court concerning whether its $105.00 filing fee had been received nor Vinyl's "Transcript Purchase Order" form sent to the district court constitutes the functional equivalent of a notice of appeal. *See Torres v. Oakland Scavenger Co.*, 108 S.Ct. 2405 (1988).

Appendix A

Accordingly,

IT IS ORDERED THAT:

AM-NAT's motion to dismiss is granted.

FOR THE COURT

s/ Glenn L. Archer, Jr.
Glenn L. Archer, Jr.
Circuit Judge

Dated: March 22, 1990

cc: Harris Zimmerman, Esq.
James B. Andres, Esq.

ISSUED AS A MANDATE: March 22, 1990

APPENDIX B — JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA FILED JULY 19, 1989

JAMES B. ANDRES
Attorney at Law
1215 North Ross Street
Santa Ana, California 92701
(714) 558-7200

GABOR L. SZEKERES
HOWARD J. KLEIN
KLEIN & SZEKERES
4199 Campus Drive
Suite 700
Irvine, California 92715
(714) 854-5502

JOHN W. CHESTNUT
TILTON, FALLON, LUNGMUS & CHESTNUT
100 South Wacker Drive
Suite 960
Chicago, Illinois 60606-4002
(312) 263-1841

Attorneys for Defendant

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

Civil Action No. 87 04046 HLH (BX)

RICHARD FRAIGE, an individual and VINYL PRODUCTS MANUFACTURING INC., a California corporation,

Plaintiffs,

Appendix B

vs.

AMERICAN NATIONAL WATERMATTRESS CORP., a California corporation,

Defendant.

JUDGMENT

TRIAL COMMENCED: May 23, 1989
TIME: 10:00 a.m.

This action came on for trial before the Court and jury, Honorable Harry L. Hupp, District Judge, presiding, and the Court having instructed the jury to answer certain interrogatories, and the jury having duly rendered a verdict and having made answer to said interrogatories,

IT IS ORDERED AND ADJUDGED as follows, in accordance with the following special interrogatories posed to the jury, and the jury's answers thereto:

1. Does the polyester product with polystyrene beads as described in and made by the process set forth in '248 and '623 patents have any actual and substantial use other than as a wave retardant in a waterbed mattress? The answer is no.

2. Do the circumstances of the license to various manufactures by Mr. Fraige and Vinyl Products Mfg. have the right to make and sell beaded fiber as described in and made by the process set forth in patents '248 and '623 plainly indicate that it should be inferred that the purchasers of said beaded fiber from the licensed manufacturers have permission of plaintiffs to use

the beaded fiber in waterbed mattresses made and sold by said purchasers? The answer is no.

3. Does any waterbed mattress made, used or sold by defendant infringe any of the claims of the '560 patent referred to in instruction No. 28? The answer is yes.

3a. If your answer is "yes", state which of the claims listed in instruction No. 28 were infringed: The answer is claims 1, 5, 6, 14, 16, 20, 21, and 29.

4. Was the defendant's infringement willful? The answer is no.

5. Was the claim of invention in the '560 patent that you have found to be infringed on sale prior to December 26, 1978? The answer is yes.

6. Was the claim of invention in the '560 patent that you have found to be infringed known or used by others in the United States before the invention thereof by Mr. Fraige? The answer is yes.

7. Before Mr. Fraige's invention, was the claim of invention in the '560 patent you have found to be infringed made in this country by others who had not abandoned, suppressed or concealed it? The answer is yes.

8. Did someone else than Mr. Fraige invent the subject matter described and claimed in the '560 patent which you have found infringed? The answer is yes.

9. Are the differences between the subject matter of the '560

patent claims which you have found infringed and the pertinent prior art such that the subject matter as a whole would have been obvious to a person having ordinary skill in the pertinent art at the time of Mr. Fraige's invention? The answer is yes.

10. Do the claims of the '560 patent which you have found infringed fail to particularly point out and distinctly claim the subject matter of Mr. Fraige's invention? The answer is no.

11. Does the specification of the '560 patent fail adequately to describe the subject matter of Mr. Fraige's invention to the claims you have found infringed? The answer is yes.

IT IS FURTHER ORDERED AND ADJUDGED as follows, following trial to the Court of the following matters:

12. It has not been proved by clear and convincing evidence that plaintiff Richard Fraige engaged in inequitable conduct before the United States Patent and Trademark Office by failing to inform the Patent Office of material prior art known to Richard Fraige during the pendency of the application for United States Patent No. 4,301,560, or by submitting the application for United States Patent No. 4,301,560 without reading and reviewing the application prior to signing the oath of inventorship.

13. No attorney's fees are awarded on the basis of inequitable conduct before the patent office. Jurisdiction is reserved to consider fees on other bases.

14. Judgment is hereby entered against Plaintiffs Richard Fraige and Vinyl Products Manufacturing, Inc., that Plaintiffs shall take nothing from Defendant American National Watermattress Corp.; that Plaintiffs' action against Defendant

Appendix B

is dismissed on the merits in its entirety, and that Defendant American National Watermattress Corp. shall recover its costs for this action in the sum of $ _____.

This Judgment is final except for the reservation in paragraph 13 for a determination whether there has been falsification of evidence, and, if so, the sanctions or remedy for such falsification, and to consider any application for fees under Rule 37(c).

Date: July 19, 1989

s/ Harry L. Hupp
United States District Judge

Presented by:

s/ J. Andres
James B. Andres
Attorneys for Defendant
American National Watermattress Corp.

APPENDIX C — RELEVANT LOWER COURT RECORD DOCUMENTS

JAMES B. ANDRES
Attorney at Law

1215 North Ross Street
Santa Ana, California 92701
(714) 558-7200
Telecopier (714) 558-7746

July 12, 1989

Joseph C. Barton, Esq.
425 California Street
Suite 2600
San Francisco, California 94104

Re: *Fraige, et al. v. E & S Vinyl*

Dear Mr. Barton:

I have received your letter of July 7, 1989, indicating Mr. Fraige's intention to appeal from the judgment finding United States Patent No. 4,301,560 invalid, and stating your intention not to dismiss this action pending that appeal.

As you know, a judgment rendered by a court of competent jurisdiction is presumed valid, notwithstanding the pendency of an appeal. Mr. Fraige's 4,301,560 patent is therefore invalid unless and until the Court of Appeals for the Federal Circuit reverses the judgment of invalidity. In the meantime, there is no reason for this action to remain pending — especially since defendant would raise the judgment of invalidity as a bar in the event that the action should come to trial pending the appeal in *Fraige v.*

Appendix C

American National. (Keep in mind that if the Federal Circuit reverses the judgment, it will order a new trial, which would almost certainly not take place before 1991.)

I suggest that we agree to mutual dismissals of this action without prejudice. Please advise at your earliest convenience.

Very truly yours,

s/ J. Andres
JAMES B. ANDRES

JBA:dw

Appendix C

LAW OFFICES OF HARRIS ZIMMERMAN
Harris Zimmerman
Michael J. Cronen
1330 Broadway, Suite 1150
Oakland, California 94612
Telephone: 415/465-0828

Attorneys for Plaintiffs/Appellants

UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

CIVIL ACTION NO. 87 04046 HLH (BX)

RICHARD FRAIGE, an individual and VINYL PRODUCTS MANUFACTURING INC., a California corp.,

Plaintiff,

vs.

AMERICAN NATIONAL WATERMATTRESS CORP., a California corp.,

Defendant.

NOTICE OF APPEAL

NOTICE IS HEREBY GIVEN that RICHARD FRAIGE, an individual, and VINYL PRODUCTS MANUFACTURING, INC., a California corporation, Plaintiffs above named, hereby appeal to the United States Court of Appeals for the Federal

Appendix C

Circuit from the final judgment entered in this action on the 19th day of July, 1989.

Respectfully submitted,

By: s/ Harris Zimmerman
Harris Zimmerman, Esq.
Michael J. Cronen, Esq.
LAW OFFICES OF HARRIS ZIMMERMAN
1330 Broadway, Suite 1150
Oakland, California 94612
(415) 465-0828

Attorneys for Plaintiffs/Appellants

Date: August 14, 1989

Filed: August 15, 1989

Appendix C

Law Offices of
HARRIS ZIMMERMAN
Attorneys at Law
1330 Broadway, Suite 1150
Oakland, California 94612
[415] 465-0828

Harris Zimmerman
Michael James Cronen
Howard S. Cohen
Registered Patent Agent

Patents
Trademarks
Unfair Competition
Fax [415] 465-2041

5 September 1989

Clerk
UNITED STATES DISTRICT COURT
Central District of California
U.S. Courthouse, Room G-8
Los Angeles, California 90012

Re: *Fraige v. American National*
CV-87-4046 HLH

Dear Sir:

I am enclosing herewith a copy of your letter of August 24, 1989 requesting $105 to perfect the Appeal in the above matter.

On August 14, 1989 I enclosed a check for $105 for the filing of the Notice of Appeal and received a receipt from the Clerk's Office dated August 17, 1989. I am also enclosing a copy of my letter of 14 August 1989 with the Clerk's receipt attached thereto.

Appendix C

Please advise me if this is to be paid again or if the Notice regarding the required fee was a duplication.

Respectfully,

s/ Harris Zimmerman
Harris Zimmerman

HZ:dls
Enc.

Received: September 7, 1989

[Handwritten note]
9/7/89
Fees Paid
s/ Flora Vallez

Appendix C

LAW OFFICES OF
HARRIS ZIMMERMAN
ATTORNEYS AT LAW
1330 BROADWAY, SUITE 1150
OAKLAND, CALIFORNIA 94612
[415] 465-0828

Harris Zimmerman
Michael James Cronen
Howard S. Cohen
Registered Patent Agent

Patents
Trademarks
Unfair Competition
Fax [415] 465-2041

14 August 1989

Clerk, U. S. District Court
Appeals Section
Central District of California
Room G-8
312 North Spring Street
Los Angeles, California 90012

Re: *Fraige v. American National*
Civil Action No. 87 04046 HLH (BX)

Dear Sir:

Enclosed please find Plaintiff, Richard Fraige et al's Notice of Appeal in connection with the above-referenced matter. Attached to the Notice of Appeal is a copy of the Judgment Plaintiff appeals from.

Also enclosed is a check for $105.00 for the filing of said Notice of Appeal.

Appendix C

Sincerely,

s/ Harris Zimmerman
Harris Zimmerman

HZ:lp

Enclosures

cc: Mr. Richard Fraige (w/enc.)
J. Barton, Esq.
J. Golant, Esq.
J. B. Andres, Esq.
G. L. Szekeres, Esq.
H. J. Klein, Esq.
J. W. Chestnut, Esq.

Received: August 21, 1989

Appendix C

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
OFFICE OF THE CLERK

U.S. Courthouse, Rm. G-8
Los Angeles, California 90012

AUGUST 24, 1989

HARRIS ZIMMERMAN
1330 BROADWAY, SUITE 1150
OAKLAND, CALIFORNIA 94612

Re: CV-87-4046-HLH

Dear HARRIS ZIMMERMAN

Pursuant to Rule 3(e) of the Federal Rules of the Appellate Procedures, as amended August 1, 1979, a $5.00 filing fee and a $100.00 docket fee is required to be paid to the Clerk, U.S. District Court.

Please remit a cashier's check or money order payable to "Clerk, U.S. District Court" in the amount of $105.00.

If payment is not received forthwith the record on appeal in this case will not be processed.

Very truly yours,
Clerk, U.S. District Court

s/ Victor A. Garcia, Jr.
By VICTOR A. GARCIA, JR.
Deputy Clerk

cc: Court of Appeals

Received: August 28, 1989

Appendix C

United States Court of Appeals for the Federal Circuit

NOTICE OF DOCKETING

89-1720 — FRAIGE V AMERICAN NATIONAL

September 14, 1989

Appeal from DCT NO. 87-04046

UNITED STATES DISTRICT COURT/CENTRAL DISTRICT OF CALIFORNIA

Name of appellant(s): RICHARD FRAIGE AND VINYL PRODUCTS MANUFACTURING, INC.

Critical dates for counsel, pro se parties, and the court include:

Date of docketing, as above (Rules 12 & 15)
Certified list due (Rule 17)
Entry of appearance due (Rule 47.3)
Certificate of interest due (Rule 47.4)
Briefs due (Rule 31)
Joint Statement of Compliance with Fed Cir. R. 33.
Calendar for oral argument or submission on briefs (Rule 34)

Pro se parties should refer to the GUIDE FOR PRO SE PETITIONER AND APPELLANTS.

Attachments (with recipients noted) to this notice include:

Official caption (All)
Rules of Practices (includes GUIDE FOR PRO SE

Appendix C

PETITIONERS AND APPELLANTS) (Private parties or counsel)
Entry of appearance form (All counsel and pro se parties)
Informal brief form (Pro se parties)
Transcript Purchase Order form (Rule 3 appellants)
Motion and Affidavit for Leave to Proceed in Forma Pauperis form (parties owing the docketing fee)

FRANCIS X. GINDHART, Clerk

cc: USDC CD/CA
HARRIS ZIMMERMAN
JAMES B. ANDRES

Appendix C

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

Official Caption[1]

89-1720

RICHARD FRAIGE and VINYL PRODUCTS MANUFACTURING, INC.,

Plaintiffs-Appellants,

v.

AMERICAN NATIONAL WATERMATTRESS CORP.,

Defendant-Appellee.

Authorized Abbreviated Caption[2]

FRAIGE V AMERICAN NATIONAL, 89-1720

---

1. Required for use on petitions, formal briefs and appendices, court opinions, and dispositive court orders. FRAP 12(a); 32(a).

2. Authorized for use only on items not requiring the Official Caption as listed in note 1.

Appendix C

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

Richard Fraige,

-versus-

American National

Appeal from U.S. District Court for Central Dist. of CA.

TRIAL COURT NO. CV 87-4046-HLH

CIRCUIT COURT NO. 89-1720

TRANSCRIPT PURCHASE ORDER
(See Rules 10(a) of the Federal Circuit Rules)

PART 1 - TO BE COMPLETED BY APPELLANT WITHIN 10 DAYS OF FILING OF NOTICE OF APPEAL.

Copies to be distributed by appellant as follows: Copies 1, 2, and 3 to court reporter; Copy 4 to Trial Court; Copy 5 to appellee; Copy 6 retained by appellant.

A. Complete one of the following:

x A transcript is not needed for appeal

x Request is hereby made to the reporter for a transcript of the following proceedings (give particulars):

Appendix C

Note: voir dire and closing arguments are not prepared unless specifically requested.

All transcripts of trial proceedings, including Voir Dire & closing arguments for: 5-23-89; 5-24-89; 5-25-89; 6-15-89; 6-16-89; 6-20-89; 6-21-89; 6-22-89/ 6-23-89 & 6-26-89.

Note: Unless the entire transcript is ordered, appellant must attach a statement of the issues to Copies 4 and 5.

B. I certify that financial arrangements have been made with the reporter. Payment is by: Private funds

Date: September 20, 1989

Counsel for Appellant

s/ Harris Zimmerman

1330 Broadway, Suite 1150
Oakland, CA 94612
(415) 463-0828

Appendix C

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

Fraige v American National

No. 89-1720

(INSTRUCTIONS: Counsel refer to Federal Circuit Rule 47.3. Pro se petitioners and appellants read paragraphs 1 and 18 of the *Guide for Pro Se Petitioners and Appellants*. File this form with the clerk and serve it on the principal attorney for each party.)

Please enter my appearance:

As counsel for: Richard Fraige/Vinyl Products Mfg., Inc.

I am, or the party I represent is: Appellant

My address and telephone are:

Harris Zimmerman, Esq.
LAW OFFICES OF HARRIS ZIMMERMAN
1330 Broadway, Suite 1150
Oakland, CA 94612
(415) 465-0828

Statement to be completed by counsel only:

I am the principal attorney for this party in this case and will accept all service for the party. I agree to inform all other counsel for the party in this case of the matters served upon me.

Date admitted to Federal Circuit bar: October 1, 1982

Date: September 22, 1989 s/ Harris Zimmerman

Appendix C

LAW OFFICES OF HARRIS ZIMMERMAN
Harris Zimmerman
Michael J. Cronen
1330 Broadway, Suite 1150
Oakland, California 94612
Telephone: 415/465-0828

Attorneys for Plaintiffs/Appellants

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

Fraige v. American National

No. 89-1720

Certificate of Interest

Counsel for Appellant Richard Fraige and Vinyl Products Manufacturing, Inc. certifies the following:

1. The full name of every party or amicus represented by me is: Richard Fraige and Vinyl Products Manufacturing, Inc.

2. The name of the real party in interest (if the party named in the caption is not the real party in interest) represented by me is: N/A

3. The publicly held affiliates of any corporate party or amicus represented by me are: None

4. The names of all law firms and the partners or associates that appeared for the party or amicus now represented by me

in the trial court or agency or are expected to appear in this court are: Ashen, Golant, Martin & Seldon, Joseph Golant, Miriam C. Beezy, Alan A. John; Law Offices of Harris Zimmerman, Harris Zimmerman, Michael J. Cronen.

s/ Harris Zimmerman
Harris Zimmerman
Counsel for Appellant

Date: September 22, 1989

CERTIFICATE OF SERVICE

I, HARRIS ZIMMERMAN, an attorney for Plaintiffs/Appellants and a member of the Bar of this Court, certify that I served the attached ENTRY OF APPEARANCE and CERTIFICATE OF INTEREST on Appellee by mailing a copy thereof, with first class postage fully affixed thereto, on this 22nd day of September, 1989 to the attorneys of record for Appellee as follows:

James B. Andres, Esq.
1215 North Ross Street
Santa Ana, California 92701

Gabor L. Szekeres, Esq.
Howard J. Klein, Esq.
Klein & Szekeres
4199 Campus Drive, Suite 700
Irvine, California 92715

John W. Chestnut, Esq.
Tilton, Fallon, Lungmus & Chestnut

Appendix C

100 South Wacker Dr., Ste. 960
Chicago, Illinois 60606-4002

s/ Harris Zimmerman
Harris Zimmerman

Appendix C

BETH,

A Michael Cronin (Ck SP) wanted to know how to fill out the Federal Circuit appeals form because he was filing an appeal and needed the transcript filed in a case I took on June 22 and June 23. Normally I keep those originals but I don't have them. I checked with trial counsel and found out you had also worked that case. So without checking my work schedule calendar that is in the courtroom, I am assuming we worked a daily on the case of Fraige v. American-Nat'l Watermattress, USDC No. Cv 86-4046-HLH.

Anyway, since I can't find the orginal and I think you may have them, do you want to call the firm of Harris Zimmerman up in Oakland (415) 465-0828, ask for Mike Cronin and see what cooks? Or you can wait until we get the appeal form — it's just that if I am involved, I would like to start working on it if I can because I will be gone Oct and working a daily when I return.

MIKE, THIS IS WHAT I DELIVERED TO BETH CULBERTSON (213) 626-2622, A CO-WORKER. HOPE THIS INFORMATION HELPS YOU.

s/ Lucille

Lucille M. Litsheim
1271 Boyton St., Apt. 36
Glendale, CA 91205
ACBL # 612-503-4
213-617-2677

Appendix C

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

APPEAL NO. 89-1720

RICHARD FRAIGE and VINYL PRODUCTS MANUFACTURING, INC.,

Plaintiffs-Appellants,

V.

AMERICAN NATIONAL WATERMATTRESS CORP.,

Defendant-Appellee.

ENTRY OF APPEARANCE

Please enter my appearance:

As Counsel for: American National Watermattress Corp.

I am, or the parties I represent are: Appellee

All communications with me should be made as follows:

James B. Andres
Attorney at Law
1215 N. Ross Street
Santa Ana, California 92701
(714) 558-7200

Appendix C

CERTIFICATE OF SERVICE

It is hereby certified that a copy of the annexed Entry of Appearance was today served by Federal Express upon counsel for Richard Fraige and Vinyl Products Manufacturing, Inc. addressed as follows:

Harris Zimmerman
Attorney at Law
1330 Broadway, Suite 1150
Oakland, California 94612

s/ J. Andres
James B. Andres

Dated: September 27, 1989

Statement to be completed by counsel one:

I am the principal attorney for these parties in this case and will accept all service for the parties. I agree to inform all other counsel for the parties in this case of the matters served upon me.

Date admitted to Federal Circuit bar: Application pending

s/ J. Andres
James B. Andres

Date: September 27, 1989

CERTIFICATE OF FACSIMILE MAILING

I hereby certify that the foregoing was filed in the Court of

Appendix C

Appeals for the Federal Circuit via facsimile at (202) 523-0072 on September 27, 1989. The original and three copies have been sent via Federal Express on this date addressed as follows:

Clerk
U.S. Court of Appeals for the Federal Circuit
717 Madison Place NW
Washington, D.C. 20439

s/ J. Andres
James B. Andres

Dated: September 27, 1989

Appendix C

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

APPEAL NO. 89-1720

RICHARD FRAIGE and VINYL PRODUCTS MANUFACTURING, INC.,

Plaintiffs-Appellants,

V.

AMERICAN NATIONAL WATERMATTRESS CORP.,

Defendant-Appellee.

CERTIFICATE OF INTEREST

Counsel for the appellee, American National Watermattress Corp., certifies the following:

1. The full name of the party represented by me is American National Watermattress Corp.

2. The real party in interest represented by me is American National Watermattress Corp.

3. The corporate party represented by me has no publicly held affiliates.

4. The names of all attorneys and law firms whose partners or associates appeared for the party now represented by me in the trial court or are expected to appear in this court are:

Appendix C

Gabor L. Szekeres, Esq.
Klein & Szekeres
4199 Campus Drive
Suite 700
Irvine, California 92715

William Sheffield, Esq.
1215 N. Ross Street
Santa Ana, California 92701

Peter Sullivan, Esq.
Gibson, Dunn & Crutcher
333 S. Grand Avenue
Los Angeles, California 90071-3197

John Chestnut, Esq.
Tilton, Fallon, Lungmus & Chestnut
100 South Wacker Drive
Suite 960
Chicago, Illinois 60606-4002

James B. Andres, Esq.
1215 N. Ross Street
Santa Ana, California 92701

Dated: September 27, 1989

s/ J. Andres
James B. Andres
Counsel for Appellee

Appendix C

CERTIFICATE OF SERVICE

It is hereby certified that one copy of the annexed Certificate Of Interest was today served by Federal Express upon counsel for Richard Fraige and Vinyl Products Manufacturing, Inc. addressed as follows:

Harris Zimmerman, Esq.
Attorneys at Law
1330 Broadway, Suite 1150
Oakland, California 94612

s/ J. Andres
James B. Andres

Dated: September 27, 1989

CERTIFICATE OF FACSIMILE MAILING

I hereby certify that the foregoing was filed in the Court of Appeals for the Federal Circuit via facsimile at (202) 523-0072 on September 27, 1989. The original and twelve copies have been sent via Federal Express on this date addressed as follows:

Clerk
U.S. Court of Appeals for the Federal Circuit
717 Madison Place NW
Washington, D.C. 20439

s/ J. Andres
James B. Andres

Dated: September 27, 1989

Supreme Court, U.S.
FILED
AUG 16 1990
JOSEPH F. SPANIOL, JR.
CLERK

(2)

No. 90-136

In The

Supreme Court of the United States

October Term, 1990

RICHARD FRAIGE and VINYL PRODUCTS MANUFACTURING, INC.,

Petitioners,

vs.

AMERICAN NATIONAL WATERMATTRESS CORPORATION,

Respondent.

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

JAMES B. ANDRES
1215 North Ross Street
Santa Ana, California 92701
(714) 558-7200

Attorney for Respondent

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

BEST AVAILABLE COPY

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STATUTES

Rule 3(c), F.R.App.P. 1, 2, 3, 4, 6, 8

Rule 4(a), F.R.App.P. 2, 5, 6, 7

Rule 4(a)(4), F.R.App.P. 2, 5, 7, 8

Respondent American National Watermattress Corporation submits the following opposition to the Petition For Writ Of Certiorari filed by petitioners Richard Fraige and Vinyl Products Manufacturing, Inc.

RULE 29.1 STATEMENT

Respondent American National Watermattress Corporation has no parent companies, subsidiaries, or affiliates.

INTRODUCTION AND SUMMARY OF ARGUMENT

Petitioners' arguments in the instant petition for writ of certiorari reduce to two fundamental contentions. The first – that a document which does not contain all of the information specified in Rule 3(c), F.R.App.P.,[1] should nevertheless be considered to be "the functional equivalent of a notice of appeal" – was squarely rejected by this Court in *Torres v. Oakland Scavenger Co.*, 487 U.S. 312 (1988).

The second – that a premature notice of appeal should be deemed to be incorporated by reference in

[1] Rule 3(c) provides as follows:

> "The notice of appeal shall specify the party or parties taking the appeal; shall designate the judgment, order or part thereof appealed from; and shall name the court to which the appeal is taken. Form 1 in the Appendix of Forms is a suggested form of a notice of appeal. An appeal shall not be dismissed for informality of form or title of the notice of appeal."

subsequently filed documents for the purpose of determining compliance with Rules 3(c) and 4(a), F.R.App.P. – is directly contrary to Rule 4(a)(4), and this Court's explication of Rule 4(a)(4) in *Griggs v. Provident Consumer Discount Co.*, 459 U.S. 56 (1982). ("The [premature] notice of appeal . . . was not merely defective; it was a nullity." (*Ibid.* 459 U.S. at 61.))

The Court of Appeals for the Federal Circuit correctly applied the law, in accordance with the decisions of this Court, in dismissing petitioners' purported appeal. The petition for writ of certiorari should be denied.

ARGUMENT

I

THE FEDERAL CIRCUIT'S RULING THAT DOCUMENTS FILED BY PETITIONERS DURING THE RULE 4(a), F.R.APP.P., APPEAL PERIOD WERE NOT "THE FUNCTIONAL EQUIVALENT OF A NOTICE OF APPEAL" WAS COMPELLED BY, AND IN ACCORDANCE WITH, THIS COURT'S DECISION IN TORRES V. OAKLAND SCAVENGER COMPANY.

The first issue petitioners have urged the Court to consider in this petition is whether documents filed by petitioners during the Rule 4(a) appeal period, subsequent to the filing of their premature notice of appeal, constitute "the functional equivalent of a notice of appeal." Petitioners pose this issue as deserving the Court's attention because (petitioners urge) the question what documents do or do not constitute the functional equivalent of a notice of appeal "has created a great deal

of conflict in decisions of various Circuit Court (sic) of Appeals." (Petition, page 8)

In reality, there is no such "conflict." This Court's decision in *Torres v. Oakland Scavenger Co.*, 487 U.S. 312 (1988) resolved the question whether a document which does not contain the information specified in Rule 3(c), F.R.App.P., qualifies as "a notice of appeal." Furthermore, *Torres v. Oakland Scavenger Co.* is controlling in the instant case, as the Federal Circuit recognized in citing *Torres* as the controlling authority in its ruling dismissing petitioners' purported appeal. (Petitioners' Appendix, page 3a)

A "notice of appeal" is defined by Rule 3(c) as a document which contains the information Rule 3(c) requires. Rule 3(c) is indifferent about the physical form or title of the document; what matters is the information the document contains. To qualify as a "notice of appeal" under Rule 3(c), a document must contain the following information:

(1) The party or parties taking the appeal

(2) The judgment, order or part thereof appealed from

(3) The name of the court to which the appeal is taken

None of the documents urged by petitioners to be the functional equivalent of a notice of appeal meets these Rule 3(c) criteria, for none identifies, expressly or by implication, "the judgment, order or part thereof appealed from." Contrary to petitioners' contention in the instant petition, therefore, the facts of this case do not present the question whether documents filed incident to

an appeal may function as a Rule 3(c) notice of appeal. The only question presented by the facts of this case is whether a document which omits information required by Rule 3(c) can be the functional equivalent of a notice of appeal notwithstanding the omission.

This Court answered exactly that question in *Torres v. Oakland Scavenger Co.* – the case cited by the Federal Circuit as the controlling authority for its ruling in the instant case. (Petitioners' Appendix, page 3a) The Court held in *Torres* that a notice of appeal which did not include petitioner Jose Torres' name as appellant was not, as to Torres, a Rule 3(c) notice of appeal. (*Torres v. Oakland Scavenger Co., supra,* 487 U.S. at 317.) (The notice met the Rule 3(c) requirements as to other parties to the action who were named in the notice.) It was irrelevant that Torres *intended* to appeal. (*Ibid.* 487 U.S. at 317.) The omission of Torres' name as appellant – one of the three items of information required by Rule 3(c) – *ipso facto* disqualified the document as a Rule 3(c) "notice of appeal." (*Ibid.* 487 U.S. at 317-318.)

> " . . . [W]e find that petitioner failed to comply with the specificity requirement of Rule 3(c), even liberally construed. Petitioner did not file the functional equivalent of a notice of appeal; he was never named or otherwise designated, however inartfully, in the notice of appeal filed by the 15 other intervenors. Nor did petitioner seek leave to amend the notice of appeal within the time limits set by Rule 4. Thus, the Court of Appeals was correct that it never had jurisdiction over petitioner's appeal." (*Torres v. Oakland Scavenger Co., supra,* U.S. at 317.)

Not only did this Court's decision in *Torres* squarely answer the question the instant petition purports to raise,

but precisely the same arguments petitioners have urged as grounds for reinstatement of their appeal were considered and rejected by the Court in deciding *Torres*. This is apparent from a comparison of petitioners' arguments in the instant petition to Mr. Justice Brennan's dissenting opinion in *Torres*. (*Ibid*. 487 U.S. at 319-325.) Petitioners' arguments are virtually a word-for-word, case-by-case, reiteration of Mr. Justice Brennan's dissenting opinion. (See 487 U.S. at 323-325.) Thus, if this Court were to grant certiorari in the instant case, and decide this case on its merits, the Court would confront precisely the same arguments which the Court confronted and decided in *Torres*. Petitioners offer nothing that even arguably supports the conclusion that the Court would view those arguments any differently in the context of this case than it did in *Torres*. *A fortiori* petitioners offer nothing that supports the conclusion that the Court would, upon revisitation of those arguments, reach a different result.

II

THE FEDERAL CIRCUIT'S RULING THAT PETITIONERS' PREMATURE NOTICE OF APPEAL WAS NOT EFFECTIVE IN COMBINATION WITH SUBSEQUENTLY FILED DOCUMENTS TO CONFER APPELLATE JURISDICTION WAS COMPELLED BY, AND IN ACCORDANCE WITH, RULE 4(a)(4) F.R.APP.P., AND THIS COURT'S DECISION IN GRIGGS V. PROVIDENT CONSUMER DISCOUNT COMPANY.

Petitioners make an alternative argument. If the documents filed by petitioners during the Rule 4(a) appeal period do not qualify as a notice of appeal in themselves, petitioners argue, they qualify if *combined* with the premature notice of appeal. The Federal Circuit's refusal to

consider those documents in combination with the premature notice of appeal was, according to petitioners, inconsistent with this Court's decision in *Foman v. Davis*, 371 U.S. 178 (1962), and with *dictim* in the Court's decision in *Torres v. Oakland Scavenger Co., supra*, 487 U.S. 312. (Petition, page 10)

Petitioners' argument that their premature notice of appeal should be combined with documents filed during the Rule 4(a) appeal period finds no support in the documents themselves. The documents do not purport to incorporate the notice of appeal by reference.[2] (Cf. *Nichols v. Asbestos Workers Local 24 Pension Plan*, 835 F.2 881, 889 fn. 74 (D.C.Cir. 1987), where the court posed and discussed a hypothetical incorporation by reference of a premature notice of appeal.) If there is any warrant for considering petitioners' premature notice of appeal in combination with subsequently filed documents for the purpose of determining compliance with Rules 3(c) and 4(a), F.R.App.P., therefore, it must be found elsewhere than in the documents themselves.

---

[2] Petitioners state at page 4 of the petition that their September 5, 1989 letter to the district court clerk concerning the appeal filing fee (14a, 15a) "incorporated by reference the notice of appeal previously filed by petitioners." The statement is not accurate. The September 5 letter referred to "the Notice of Appeal," and enclosed a copy of an earlier letter (16a) which referred to "the Notice of Appeal." Neither letter purported to incorporate the notice of appeal, or the information in the notice of appeal, by reference.

The only other possible warrant for combining petitioners' premature notice of appeal with the subsequently filed documents would be a rule of law requiring such combination – notwithstanding the silence of the documents about incorporation by reference. But there is plainly no such rule of law. Furthermore, the creation of such a rule of law would be contrary to Rule 4(a)(4), which expressly states that a premature notice of appeal "shall have no effect." This Court has interpreted Rule 4(a)(4) to mean that a premature notice of appeal is "not merely defective," but "a nullity." (*Griggs v. Provident Consumer Discount Co., supra,* 459 U.S. 56, 61 (1982).)[3]

The Federal Circuit was thus undeniably correct in concluding that there is no warrant for combining petitioners' premature notice of appeal with documents filed during the Rule 4(a) appeal period as grounds for assuming appellate jurisdiction of the case.

---

[3] *Foman v. Davis,* 371 U.S. 178 (1962), decided 17 years before the enactment of Rule 4(a)(4), did not purport to create or recognize a rule of law that a premature notice of appeal must be considered in combination with subsequently filed documents in determining appellate jurisdiction. Among other reasons, appellate jurisdiction was not in issue in *Foman.* Petitioner Foman had unquestionably perfected an appeal; the issue was what district court ruling was before the appellate court for review. Under the unique circumstances of the case (the parties had briefed and argued the same district court ruling), this Court held that the premature notice of appeal was effective – not to invoke appellate jurisdiction – but to justify appellate review of the judgment designated in the premature notice of appeal.

CONCLUSION

"It is well settled that the requirement of a timely notice of appeal is 'mandatory and jurisdictional.' " (*Griggs v. Provident Consumer Discount Co., supra,* 459 U.S. 56 at 61.) Two other rules of law are also well settled.

The first is that a document which does not contain the information required by Rule 3(c), F.R.App.P., is not "the functional equivalent of a notice of appeal." (*Torres v. Oakland Scavenger Co., supra,* 487 U.S. 312, 317.) The second is that a notice of appeal filed prematurely under Rule 4(a)(4) is "a nullity." (*Griggs v. Provident Consumer Discount Co., supra,* 459 U.S. 56 at 61.).

The Court of Appeals for the Federal Circuit correctly applied each of these settled rules of law in the instant case. The petition for writ of certiorari should accordingly be denied.

Respectfully submitted,

JAMES B. ANDRES
Attorney for Respondent
American National Watermattress Corporation